Supreme Court, U.S.
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No. 00-1871

IN THE

Supreme Court of the United States

ANDREW L. MANNING, *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Rather than engage Petitioners on the questions presented, Respondents attempt to avoid those questions by mischaracterizing the decision below. Instead of addressing the clear, unavoidable conflict between the Eleventh Circuit's "substantial cause" standard for identifying vestiges of past discrimination and decisions of this Court and other Courts of Appeals, Respondents seek to obscure this core holding by characterizing it as dictum. Similarly, Respondents argue that Petitioners have waived any claim that the School Board must show that it will not revert to its discriminatory practices in the future, despite the fact that their failure of proof was an explicit ground of the District Court's decision and before the Eleventh Circuit. Finally, Respondents dismiss the third question presented as also concerned only with dictum, even though the decision below clearly adopts a different standard of review for a District Court's factual findings where the case has been referred to a Magistrate Judge. By failing to confront the issues directly, Respondents concede that they have no substantive response to Petitioners' representation in the petition: that the questions presented involve clear error, or conflict among the Courts of Appeals, and are worthy of this Court's review.

I. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S HOLDING ON "SUBSTANTIAL CAUSE."

Respondents refuse to acknowledge that the Eleventh Circuit's holding in this case relies on the novel "substantial cause" standard. Instead, Respondents insist that the decision below rests entirely on the District Court's alleged misuse of one word – that is, when the District Court spoke of Respondents' obligation to "desegregate to the maximum extent practicable," it misstated the applicable legal standard, which requires Respondents only to "desegregate to the extent practicable." Opp. at 12-13; *see* Pet. App. at 32a. *Compare Lockett v. Board of Educ.*, 92 F.3d 1092, 1101

(11th Cir. 1996) [hereinafter *Lockett I*] ("maximum extent practicable"), *with Lockett v. Board of Educ.*, 111 F.3d 839, 842 (11th Cir. 1997) [hereinafter *Lockett II*] ("extent practicable"). According to Respondents, correcting the District Court's use of *Lockett I*'s "incorrect legal standard" and the resulting "taint[] and infect[ion]" of its factual findings was the *only* holding of the Eleventh Circuit; all else is "dicta." Opp. at 14.

A fair reading of the decision below, however, reveals that the Eleventh Circuit's "substantial cause" standard was essential to its holding and not merely dictum. As set forth in the petition, settled precedents dictate that, given a history of *de jure* segregation, existing racial imbalances presumptively violate the Equal Protection Clause. Pet. at 9 (citing *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 209 (1973)). A school board can only overcome the presumption by showing that the imbalances are not traceable at all to past discrimination. *Brown v. Board of Educ.*, 978 F.2d 585, 591 (10th Cir. 1992) (requiring proof that imbalance is "only a product of demographic changes outside the school district's control"); *Jenkins v. Missouri*, 122 F.3d 688, 593 (8th Cir. 1997) ("[P]laintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation.'") (quoting *Keyes*, 413 U.S. at 211 n.17).

Had it followed these precedents, the Eleventh Circuit would have had no choice but to affirm the District Court's ruling, given that court's unambiguous factual finding that Respondents' evidence – demographic and otherwise – failed to prove that existing racial imbalances in Hillsborough County are beyond their control. Pet. App. at 46a-48a, 77a-130a. To reject the District Court's factual findings, therefore, the Eleventh Circuit had to do exactly what it did: adopt a new legal standard, "substantial cause," that required only a minimal showing by Respondents. *See* Pet. App. at 35a ("Where a defendant school board shows that demographic shifts are a substantial cause of the racial

imbalances, the defendant has overcome the presumption of de jure segregation."). With this holding, the Eleventh Circuit effectively shifted the burden of proof to Petitioners: "[Petitioners] were required to show that the demographic shifts were the result of the past desegregative practices or some other discriminatory conduct." Pet. App. at 36a.

In an effort to avoid the patent conflict between this holding and the holdings of the Eighth and Tenth Circuits, Respondents attempt to characterize the ruling below as merely a presumptive framework that did not alter Respondents' overall burden of proof on causation. Opp. at 15. This summary, however, obscures the reality of the Eleventh Circuit's decision. In the Eighth and Tenth Circuits, and even under the plain text of *Lockett II*, a school board must show that existing racial imbalances "are not the result of present or past discrimination on its part." 111 F.3d at 843. Under the Eleventh Circuit's new reading of *Lockett II*, however, a school board can escape responsibility if it can point to demographics as a "substantial cause" of current imbalances, even if other factors originating with the board's past segregative practices are concurrent causes of the imbalances.[1] This holding indisputably shifts the burden of proof to desegregation plaintiffs, even in districts with histories of segregation, a marked shift from the approach of other Courts of Appeals that warrants review by this Court.

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[1] "Substantial cause" has an established legal meaning and, should the decision below remain in effect, it will undoubtedly inform future desegregation cases in the Eleventh Circuit. "[S]ubstantial cause does not mean sole or predominant cause, but simply a materially contributing factor." *Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters*, 704 F.2d 1443, 1448 (9th Cir. 1983); *Royal Crown Co. v. Coca-Cola Co.*, 887 F.2d 1480, 1486 (11th Cir. 1989) (holding that plaintiff need show only that defendant's conduct was "*a* substantial cause," not the sole cause, of its harm). Thus, all desegregation defendants in the Eleventh Circuit – but nowhere else – will be able to seek and obtain unitary status even where other factors tied to past segregative practices are also substantial or even predominant causes of current racial imbalances.

Respondents' focus on the supposed disconnect between *Lockett II* and the District Court's use of *Lockett I*'s "maximum practicability" language only obscures the real issue, for a fair reading of *Lockett II* reveals that it could not have been the basis for the decision below. To the extent that *Lockett II* embodies a more lenient practicability standard than *Lockett I* – and Petitioners dispute that it does[2] – practicability standards serve only to delimit the extent to which a school district must go to remedy *de jure* segregation. Here, the District Court expressly followed established precedent and did not hold Respondents responsible for "racial imbalances unrelated to *de jure* segregation." Pet. App. at 79a. As the District Court noted, however, the issue before it was not one of practicability, but causation itself – whether Hillsborough County's imbalances were vestiges of past discrimination, or created by factors beyond Respondents' control. Pet. App. at 52a ("Who has made the determination that [Respondents] did not cause the imbalances?").

Any distinction between *Lockett I* and *Lockett II* as to practicability is irrelevant to this question. The "substantial cause" standard, however, as applied in this case and as it will be applied throughout the Eleventh Circuit, dramatically reduces the burden on desegregation defendants, departs from settled precedent, and warrants review by this Court.

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[2] Contrary to Respondents' assertions and the Eleventh Circuit's reading of the District Court's ruling, the District Court did not rely upon *Lockett I* for invalid principles of law. Rather, the District Court merely cited *Lockett I* for settled principles of law set forth in the precedents of this Court. For example, in determining that Respondents had not proved that current imbalances in Hillsborough County were unrelated to past *de jure* segregation, the District Court cited *Lockett I* for the unassailable proposition that it must consider whether: (1) current imbalances are proximally connected to past constitutional violations; (2) Respondents had complied with the consent order; and (3) Respondents had demonstrated good faith. Pet. App. at 53a (citing *Lockett I*, 92 F.3d at 1097) (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

II. RESPONDENTS' FAILURE TO ASSURE GOOD-FAITH COMPLIANCE IS PROPERLY BEFORE THIS COURT.

With regard to the second question presented. Respondents do not contest the unassailable principle that proof of a school district's good faith requires a showing that is both retrospective, that a district has complied with the Equal Protection Clause and with court orders, and prospective, that a district is "unlikely . . . to return to its former ways." *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) *see also Freeman*, 503 U.S. at 491-92 (holding that district must demonstrate "its commitment to a course of action"); Opp. at 24-26. Moreover, apart from an unsupported and conclusory assertion that "all . . . Circuit Courts of Appeal" look to past compliance as evidence of good faith, Respondents do not deny that the Eleventh Circuit's ruling is in clear conflict with the Tenth Circuit's holding in *Dowell* that requires courts to examine "specific policies, decisions, and courses of action that extend *into the future*." *Dowell v. Board of Educ.*, 8 F.3d 1501, 1512 (10th Cir. 1993) (quoting *Brown*, 978 F.2d at 592) (emphasis added). Nor do Respondents point to any proof of such future plans in the record – conceding that the District Court was correct when it held that Respondents had failed to meet their burden of proof. Pet. App. at 54a.

Instead, Respondents complain that Petitioners cannot raise this point now because they did not challenge the Magistrate Judge's report, which looked only at Respondents' past compliance, Opp. at 25, and that, in any event, the District Court's holding was based entirely on Respondents' past noncompliance with its orders. Therefore, according to Respondents, the Eleventh Circuit was right to reverse once it determined that Respondents had been in compliance. *Id.*

Neither of these arguments has merit. The text of the District Court's December 4, 1998 opinion made clear that

Respondents' past compliance and future course of action were both at issue: "The good faith requirement assures parents, students, and the public that they will be protected against further injuries or stigma, by making it unlikely that the school district would return to its former ways." Pet. App. 53a (internal quotations marks and citation omitted). The District Court went on to hold that "[a]n integral part of this proof will be documentation of strategic planning Defendants have engaged in to ensure that discrimination does not occur *in the future*." *Id.* at 54a (emphasis added). Plainly, the District Court properly examined both the retrospective and prospective elements of good faith in denying Respondents unitary status. That Petitioners did not raise prospective good faith in their objections to the Magistrate Judge's report is irrelevant in light of the District Court's consideration of the issue. *See Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989) ("Even if neither party objects to the magistrate's recommendation, the district court is not bound by the recommendation of the magistrate."); *see also DeLeon v. Strack*, 234 F.3d 84, 87 (2d Cir. 2000) ("[I]f in the absence of any party's objection the district court undertakes *de novo* review of a magistrate judge's report, there is no danger that an appellant will raise issues that were never considered by the district court.").

Moreover, and contrary to Respondents' assertions, Petitioners did not abandon this issue in defense of the District Court's ruling before the Eleventh Circuit. *See* Feb. 12, 2000 Brief of Plaintiffs-Appellees at 47 (noting that Respondents did not meet the standards set forth by the Tenth Circuit in *Dowell*, where the school board "not only had demonstrated a good-faith compliance in the past, but also had taken affirmative steps to ensure as much desegregation as practical in the future"). That the Eleventh Circuit improperly ignored Respondents' failure to provide sufficient evidence of future compliance does not thereby preclude Petitioners from raising this question now – if that were the case, appellate courts could shield their decisions from

further review simply by declining to address those bases of the trial court's rulings they find inconvenient.

Finally, there can be no doubt that the Eleventh Circuit's ruling conflicts with the Tenth Circuit's holding in *Dowell.* There, the Tenth Circuit explicitly enunciated prospective compliance as a separate prong of the good-faith inquiry. 8 F.3d at 1501. In a nuanced opinion strikingly at odds with the Eleventh Circuit's ruling below, that Court looked to "future-oriented board policies manifesting a continued commitment to desegregation" rather than "potentially self-serving statements" by school officials. *Id.* By contrast, the Eleventh Circuit looked only to Respondents' past compliance through the purportedly different lens of "practicability" and "maximum practicability." Pet App. at 37a-40a. But regardless of whether this distinction has any meaning for purposes of a court's analysis of the two substantive elements of good faith, the Eleventh Circuit clearly erred and contradicted the Tenth Circuit by failing to require any proof at all of one of these elements. This is particularly true where, as here, Respondents failed to provide any reasonable assurance to the District Court about their future plans. *See* Pet. App. at 54a; Pet. at 24. For this reason, the Court should grant certioriari on the second question presented independent of its decision with regard to the other questions presented.

III. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S DEPARTURE FROM THE "CLEARLY ERRONEOUS" STANDARD.

Despite clear statements of the District Court's findings on school assignment, the Court held that "we are convinced that the district judge agreed with the magistrate judge and found that shifting demographics was a substantial cause of the racial imbalances." Pet. App. at 21a. The Eleventh Circuit could only have reached this ruling, however, by abandoning its deference to the trial judge's legally-mandated *de novo* review of the Magistrate Judge's

findings. *See* 28 U.S.C. § 636. For, as noted earlier, the District Court's purportedly improper citation to *Lockett I*'s practicability language is irrelevant to the identification of the cause of current racial imbalances, and therefore cannot have "tainted" or "infected" the District Court's factual findings. In short, it is hard to escape the conclusion that the Eleventh Circuit simply favored the Magistrate Judge's factual findings over those of the District Court – but that alone is insufficient reason to usurp the role of the district judge.

Similarly, the Eleventh Circuit's preference for the Magistrate Judge's findings on good faith over those of the District Court cannot be justified by the District Court's citation to *Lockett I* rather than *Lockett II*. *See Lockett II*, 111 F.3d at 842 ("Under this standard, we are not entitled to 'reverse the finding of the trier of fact simply because [we are] convinced that [we] would have decided the case differently'"). The District Court found, for example, that Respondents' own failure to understand the import of programs such as the majority-to-minority transfer program "cast doubt on the competence of the individuals charged with the task of desegregating the schools," Pet. App. at 134a, particularly since not a single transfer had been approved since the 1971 Order, *id.* at 137a. This finding regarding the competence and good faith of the very individuals charged with compliance is wholly independent of whether Respondents must desegregate to the "extent practicable." Rather, it represents a clearly supportable factual finding that should be respected absent clear error – respect it was not accorded by the Eleventh Circuit. *See* Pet App. at 39a.

Respondents' final arguments regarding the third question presented are merely attempts to retry the facts. *See* Opp. at 28-30. They are not properly before this Court, and in no way do they rehabilitate the clear errors in the Eleventh Circuit's ruling.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners' opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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